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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/815,134	03/22/2001	Yuki Uchida	2271/61807	4845

7590 07/14/2004

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EXAMINER

FISCHER, ANDREW J

ART UNIT	PAPER NUMBER
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3627

DATE MAILED: 07/14/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

09/815,134

Applicant(s)

UCHIDA, YUKI

Examiner

Andrew J. Fischer

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WU

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 21 April 2004.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-23 is/are pending in the application.
- 4a) Of the above claim(s) 11-23 is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-10 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. _____.
 - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- ☒ Notice of References Cited (PTO-892)
- ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date _____
- ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____
- ☐ Notice of Informal Patent Application (PTO-152)
- ☐ Other: _____

DETAILED ACTION

Restriction

1. Applicant's election with traverse of Group I (claims 1-10) in the reply filed on April 21, 2004 is acknowledged. The traversal is on the ground(s) that:

Under 35 U.S.C. restriction may be required if two or more independent and distinct inventions are claimed application. . . . Under MPEP "independent" means there is no disclosed relationship between the subjects disclosed. As acknowledged in the Office Action, Groups 1-111 are related as process/system and apparatus its practice. Therefore, Applicant respectfully submits that the Groups are not independent. [Emphasis in original.]¹

2. This is not found persuasive because the Inventions are not required to be *both* independent and distinct. See MPEP §802.01. In this case the inventions are distinct. The requirement is therefore still deemed proper and is therefore made FINAL.
3. The Examiner notes that Applicant has admitted that the groups of inventions are related.
4. According to MPEP §803, where two groups of inventions are related, a restriction is proper if the examiner can meet a two prong analysis: (1) if the inventions are distinct, and (2), the examiner establishes a serious burden.

Element 1: Are the Inventions Distinct

5. In *In re Lee*, 199 USPQ 108 (ComrPats 1978), applicant petitioned to withdraw a restriction requirement. The Commissioner noted that:

In the situation where the inventions in question are 'related', it is necessary, to support a restriction requirement, to show that they are 'distinct'. MPEP 802.01 defines 'distinct' as necessitating that the inventions, inter alia, be patentable over each other." *In re Lee*, 199 USPQ at 109.

¹ Applicant's Reply dated April 12, 2004, Page 2, 2nd Full Paragraph.

6. The Examiner concludes as a matter of law that for related inventions, prong (1) essentially requires that two inventions to be patentably distinct over each other.

7. Applicant has not yet admitted that the groups of inventions are patentably distinct. Should Applicant specifically state this on the record, the Examiner might reconsider the restriction.

Serious Burden

8. Regarding Applicant's discussion of serious burden, the too is not persuasive. The following example will help illustrate this point.

First and for simplicity of argument, assume that a hypothetical patent application has two groups of inventions: group I has claims 1-10 (directed to *e.g.* a product) while group II consists of claims 11-20 (directed to *e.g.* a process). It is also easier to assume that claims 1 and 11 are independent claims (although this is not necessarily required). All claim limitations in claims 1-10 will be summarized at "AB." Also in our hypothetical patent application, assume that group II (claims 11-20) contains some of the same limitations as group I (the "B" limitations) but group II also includes some *additional* limitations "C." In summary, our hypothetical patent application has two groups; group I (claims 1-10) has limitations "AB" while group II (claims 11-20) has limitations "BC."

The analysis is straight forward. If the two groups of inventions (groups I and II) are not patentably distinct, a restriction is clearly improper. See *e.g. In re Gold*, 42 USPQ2d 1095, 1096 (ComrPats 1996)(Unpublished)(holding that because of applicant's admission that the two groups of inventions stand or fall together, applicant has made an implied admission that the groups of inventions are not patentably distinct—the restriction is therefore improper).

However on the other hand, if the inventions *are* patentably distinct, limitations "C" in group II *must* (by definition) contain patentably distinct features. Because of the mandatory search requirements for allowance in class 705,² the Examiner would be *required* to search for limitations "C" and perform additional template searches—even if limitations "AB" were searched and considered allowed. This additional searching for limitations "C" is a different field of search and is therefore *prima facie* evidence of a serious burden on the examiner. See MPEP §808.02.

The same is true if group II (claims 11-20, limitations BC) were elected and allowed. In that case, the Examiner would be *required* to search for limitations "A" and perform additional template searches—even if limitations "BC" was searched and considered allowed. This additional searching for limitations "A" is a different field of search and also *prima facie* evidence of a serious burden on the examiner. See MPEP §808.02.

Conclusion

The Examiner concludes that, as a matter of law, if two groups of related inventions are each patentably distinct from each other (*i.e.* group I is patentably distinct from group II, and group II is patentably distinct from group I), the mandatory search requirements for allowance in class 705 will automatically create a serious burden on the Examiner. Thus, the Examiner can always meet the serious burden prong if the two groups of inventions are patentably distinct. Having established that prongs (1) and (2) are each met, *inter alia*, by showing that the groups of inventions are patentably distinct, the examiner has established a *prima facie* case for restriction. This

² See *Notification of Required and Optional Search Criteria for Computer Implemented Business Method Patent Applications in Class 705, and Request for Comments*, Federal Register, Vol 66, No. 108, June 5, 2001.

question of whether the inventions are "patentably distinct" is therefore ultimately the determinative question for restriction between related inventions in class 705.

9. In this case, if Applicant expressly states on the record in response to this Office Action and *after each amendment* that the groups of inventions are *not* patentably distinct from each other (*i.e.* both ways), the restriction may be withdrawn. However, until Applicant makes this statement on the record, it is the Examiner's factual determination that the inventions are patentably distinct and the requirement is still deemed proper and is therefore made final.

10. Claims 12-23 are withdrawn from further consideration pursuant to 37 C.F.R. §1.142(b), as being drawn to a nonelected invention, there being no allowable generic or linking claim. Applicant timely traversed the restriction requirement in the reply filed on April 21, 2004.

Acknowledgements

11. This Office Action is written in OACS. Because of this, the Examiner is unable to control formatting, paragraph numbering, font, spelling, line spacing, and/or other word processing issues. The Examiner sincerely apologies for these errors.

Claim Rejections - 35 USC §112

12. The following is a quotation of the 2nd paragraph of 35 U.S.C. §112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

13. Claims 1-10 rejected under 35 U.S.C. 112, 2nd paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. The claims are replete with errors. Some examples follow.

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- a. In claims 1 and 6, the phrase “without reliance on user action” is indefinite. If the user did not act or create an action, the transaction can not take place.
- b. In claims 3 and 9, it is unclear if “a selected aspect of information” is the information or different information as “a selected aspect of information” as recites in claims 1 and 6 respectively.

Claim Rejections - 35 USC §102

14. The following is a quotation of the appropriate paragraphs of 35 U.S.C. §102 that form the basis for the rejections under this section made in this Office Action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States. . . .

(c) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

15. Claims 1-10 are rejected under 35 U.S.C. §102(b) as being anticipated by Beaston et. al. (U.S. 5,892,824)(“Beaston”). Beaston discloses automatically identifying, without reliance on user input, a selected aspect of information (price, tax, description); sending a print request to a printing apparatus (the receipt printer); printing the information; notifying a control apparatus of communication between the user-side and supplier side (verbally communicating with a check-out attendant or sales clerk).

16. After careful review of the specification, the Examiner is unaware of any desire—either expressly or implicitly—by Applicant to be his own lexicographer and to define a claim term to have a meaning other than its ordinary and accustomed meaning. Therefore, the Examiner starts

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with the heavy presumption that all claim limitations are given their ordinary and accustomed meaning. See *Bell Atlantic Network Services Inc. v. Covad Communications Group Inc.*, 262 F.3d 1258, 1268, 59 USPQ2d 1865, 1870 (Fed. Cir. 2001) (“[T]here is a heavy presumption in favor of the ordinary meaning of claim language as understood by one of ordinary skill in the art.”); *CCS Fitness Inc. v. Brunswick Corp.*, 288 F.3d 1359, 1366, 62 USPQ2d 1658, 1662 (Fed. Cir. 2002) (There is a “heavy presumption that a claim term carries its ordinary and customary meaning.”). See also MPEP, 2111.01 and *In re Zletz*, 893 F.2d 319, 321, 13 USPQ2d 1320, 1322 (Fed. Cir. 1989).³

In accordance with the ordinary and accustomed meaning presumption, during examination the claims are interpreted with their “broadest reasonable interpretation” *In re Morris*, 127 F.3d 1048, 1054, 44 USPQ2d 1023, 1027 (Fed. Cir. 1997). See also MPEP, 2111.

However, if Applicant disagrees with the Examiner and has either (a) already used lexicography or (b) wishes to use lexicography and therefore (under either (a) or (b)) desires a claim limitation to have a meaning other than its ordinary and accustomed meaning, the Examiner respectfully requests Applicant in his next response to expressly indicate⁴ the claim limitation at

³ It is the Examiner’s position that “plain meaning” and “ordinary and accustomed meaning” are synonymous. See e.g. *Rexnord Corp. v. Laitram Corp.*, 274 F.3d 1336, 1342, 60 USPQ2d 1851, 1854 (Fed. Cir. 2001) (“[A]ll terms in a patent claim are to be given their plain, ordinary and accustomed meaning . . .”).

⁴ “Absent an *express intent* to impart a novel meaning, terms in a claim are to be given their ordinary and accustomed meaning. [Emphasis added.]” *Wenger Manufacturing Inc. v. Coating Mach. Sys., Inc.*, 239 F.3d 1225, 1232, 57 USPQ2d 1679, 1684 (Fed. Cir. 2001) (citations and quotations omitted). “In the absence of an *express intent* to impart a novel meaning to claim terms, an inventor’s claim terms take on their ordinary meaning. We indulge a heavy presumption that a claim term carries its ordinary and customary meaning. [Emphasis added.]” *Teleflex Inc. v. Ficosa North America Corp.*, 299 F.3d 1313, 1325, 63 USPQ2d 1374, 1380 (Fed. Cir. 2002) (citations and quotations omitted).

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issue and to show where in the specification or prosecution history the limitation is defined. Such definitions must be clearly stated in the specification or file history. *Bell Atlantic*, 262 F.3d at 1268, 59 USPQ2d at 1870, (“[I]n redefining the meaning of particular claim terms away from the ordinary meaning, the intrinsic evidence must ‘clearly set forth’ or ‘clearly redefine’ a claim term so as to put one reasonably skilled in the art on notice that the patentee intended to so redefine the claim term”).⁵ The Examiner cautions that no new matter is allowed.

Applicant is reminded that failure by Applicant in his next response to properly traverse this issue in accordance with 37 C.F.R. §1.111(b) or to be non-responsive to this issue entirely will be considered a desire by Applicant to forgo lexicography in this application and to continue having the claims interpreted with their broadest reasonable interpretation.⁶ Additionally, it is the Examiner’s position that the above requirements are reasonable.⁷ Unless expressly noted otherwise

⁵ See also *Vitronics Corp. v. Conceptronic, Inc.*, 90 F.3d 1576, 1582, 39 USPQ2d 1573, 1576 (Fed. Cir. 1996), (“[A] patentee may choose to be his own lexicographer and use terms in a manner other than their ordinary meaning, *as long as* the special definition of the term is *clearly stated* in the patent specification or file history. [Emphasis added.]”); *Multiform Desiccants Inc. v. Medzam Ltd.*, 133 F.3d 1473, 1477, 45 USPQ2d 1429, 1432 (Fed. Cir. 1998) (“Such special meaning, however, must be sufficiently clear in the specification that any departure from common usage would be so understood by a person of experience in the field of the invention.”). See also MPEP §2111.01, subsection titled “Applicant May Be Own Lexicographer” and MPEP §2173.05(a) titled “New Terminology.”

⁶ See 37 C.F.R. §1.104(c)(3) which states in part: “the examiner may rely upon admissions by applicant . . . as to *any matter* affecting patentability [Emphasis added.]”

⁷ The Examiner’s requirements on this matter are reasonable on at least two separate and independent grounds. First, the Examiner’s requirements are simply an express request for clarification of how Applicant intends his claims to be interpreted so that lexicography (or even an *attempt* at lexicography) by Applicant is not inadvertently overlooked by the Examiner. Second, the requirements are reasonable in view of the USPTO’s goals of compact prosecution, productivity with particular emphasis on reductions in both pendency and cycle time, and other goals as outlined in the USPTO’s The 21st Century Strategic Plan, February 3, 2003 available at www.uspto.gov/web/offices/com/strat21/index.htm (last accessed July 12, 2004).

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by the Examiner, the preceding discussion on claim interpretation principles applies to all examined claims currently pending.

17. To the extent that the Examiner's interpretations are in dispute with Applicant's interpretations, the Examiner hereby adopts the following definitions—under the broadest reasonable interpretation standard—in all his claim interpretations.⁸ Moreover, while the following list is provided in accordance with *In re Morris*, the definitions are a guide to claim terminology since claim terms must be interpreted in context of the surrounding claim language.⁹ Finally, the following list is not intended to be exhaustive in any way:

Electronic “2 : of, relating to, or utilizing devices constructed or working by the method or principles of electronics; also : implemented on or by means of a computer <~ food stamps> <~ banking>” Computer Dictionary, 3rd Edition, Microsoft Press, Redmond, WA, 1997.¹⁰

Server: “2. On the Internet or other network, a computer or program that responds to commands from a client.” *Id.* **Client**: “3. On a local area network or Internet, a computer that

⁸ While most definition(s) are cited because these terms are found in the claims, the Examiner may have provided additional definition(s) to help interpret words, phrases, or concepts found in the definitions themselves or in the prior art.

⁹ See e.g. *Brookhill-Wilk 1 LLC v. Intuitive Surgical Inc.*, 334 F.3d 1294, 1300, 67 USPQ2d 1132, 1137 (Fed. Cir. 2003) (abstract dictionary definitions are not alone determinative; “resort must always be made to the surrounding text of the claims in question”).

¹⁰ Based upon Applicant's disclosure, the art of record, and the knowledge of one of ordinary skill in this art as determined by the factors discussed in MPEP §2141.03 (where practical), the Examiner finds that the *Microsoft Press Computer Dictionary* is an appropriate technical dictionary known to be used by one of ordinary skill in this art. See e.g. *Altiris Inc. v. Symantec Corp.*, 318 F.3d 1363, 1373, 65 USPQ2d 1865, 1872 (Fed. Cir. 2003) where the Federal Circuit used the *Microsoft Press Computer Dictionary* (3d ed.) as “a technical dictionary” to define the term “flag.” See also *In re Barr*, 444 F.2d 588, 170 USPQ 330 (CCPA 1971)(noting that its appropriate to use technical dictionaries in order to ascertain the meaning of a term of art) and MPEP §2173.05(a) titled ‘New Terminology.’

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accesses shared network resources provided by another computer (called a server).” *Id. Computer*: “Any machine that does three things: accepts structured input, processes it according to prescribed rules, and produces the results as output.” *Id.*

Information “2 a . . . (3): FACTS, DATA” Merriam-Webster’s Collegiate Dictionary, 10th Edition, Merriam-Webster Inc., Springfield, M.A., 1997.

18. Functional recitation(s) using the word “for” or other functional terms (*e.g.* “for automatically printing” as recited in claim 1) have been considered but given less patentable weight¹¹ because they fail to add any steps and are thereby regarded as intended use language. A recitation of the intended use of the claimed invention must result in additional steps. See *Bristol-Myers Squibb Co. v. Ben Venue Laboratories, Inc.*, 246 F.3d 1368, 1375-76, 58 USPQ2d 1508, 1513 (Fed. Cir. 2001) (Where the language in a method claim states only a purpose and intended result, the expression does not result in a manipulative difference in the steps of the claim.).

19. Additionally, the Examiner notes that “the PTO and the CCPA acknowledged product-by-process claims as an exception to the general rule requiring claims to define products in terms of structural characteristics.” *Atlantic Thermoplastics Co. v. Faytex Corp.*, 970 F.2d 834, 845, 23 USPQ2d 1481, 1490 (Fed. Cir. 1992) (hereinafter “*Atlantic Thermoplastics v. Faytex I*”).

Furthermore, the Federal Circuit “acknowledges that it has in effect recognized . . . product-by-process claims as exceptional.” *Atlantic Thermoplastics v. Faytex I*, 970 F.2d at 847, 23 USPQ2d at 1491.

Because of this exceptional status, the Examiner has carefully reviewed claims 1-10 and it is the Examiner’s position that the claims *do not* contain any product-by-process limitations

whether in a conventional format or otherwise. If Applicant disagrees with the Examiner, the Examiner respectfully requests Applicant in his next response to expressly point out any product-by-process claim(s) and their limitations so that they may be afforded their exceptional status and treated accordingly. Applicant is reminded that "even though product-by-process claims are limited by and defined by the process, determination of patentability is based on the product itself." *In re Thorpe*, 777 F.2d 695, 697, 227 USPQ 964, 966 (Fed. Cir. 1985) (citations omitted).¹² Failure by Applicant in his next response to also address this issue in accordance with 37 C.F.R. §1.111(b) or to be non-responsive to this issue entirely will be considered intent by Applicant *not* to recite any product-by-process limitations. Unless expressly noted otherwise by the Examiner, the preceding discussion on product-by-process principles applies to all examined claims currently pending.

Conclusion

20. The following references are considered pertinent to Applicant's disclosure: Yen (U.S. 6,456,207 B1); Hills et. al. (U.S. 6,164,528); Coli et. al. (U.S. 6,018,713); Kumar (U.S. 5,489,773); Burks et. al. (U.S. 5,396,417); Mori (U.S. 4,932,485); and Ohara (U.S. 4,396,985).

21. The following two (2) citations to the Manual of Patent Examining Procedure ("MPEP") apply to this Office Action: MPEP citations to Chapters 200, 700, 1800, and 2100 are from the MPEP 8th Edition, Rev 1, February 2003. All remaining MPEP citations are from MPEP 8th Edition, August 2001.

¹¹ See *e.g. In re Gulack*, 703 F.2d 1381, 217 USPQ 401, 404 (Fed. Cir. 1983)(stating that although all limitations must be considered, not all limitations are entitled to patentable weight).

¹² See also MPEP §2113.

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22. Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

23. In accordance with *In re Lee*, 277 F.3d 1338, 1344-45, 61 USPQ2d 1430, 1434-35 (Fed. Cir. 2002), the Examiner finds that the references How Computers Work Millennium Ed. by Ron White; How Networks Work, Millennium Ed. by Frank J. Derfler et. al.; and How the Internet Works, Millennium Ed. by Preston Gralla are additional evidence of what is basic knowledge or common sense to one of ordinary skill in this art. Each reference is cited in its entirety. Moreover, because these three references are directed towards beginners (see e.g. "User Level Beginning . . ."), because of the references' basic content (which is self-evident upon review of the references), and after further review of the entire application and all the art now of record in conjunction with the factors as discussed in MPEP §2141.03 (where practical), the Examiner finds that these three references are primarily directed towards those of low skill in this art. Because these three references are directed towards those of low skill in this art, the Examiner finds that one of ordinary skill in this art must—at the very least—be aware of and understand the knowledge and information contained within these three references.

24. In accordance with the USPTO's goals of customer service, compact prosecution, and reduction of cycle time, the Examiner has made every effort to clarify his position regarding claim interpretation and any rejections or objections in this application. Furthermore, the Examiner has

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provided Applicant with notice—for due process purposes—of his position regarding his factual determinations and legal conclusions. If Applicant disagrees with any factual determination or legal conclusion made by the Examiner in this Office Action whether expressly stated or implied,¹³ the Examiner respectfully reminds Applicant to properly traverse the Examiner's position(s) in accordance with 37 C.F.R. §1.111(b) in his next response. By addressing these issues now, matters where the Examiner and Applicant agree can be eliminated allowing the Examiner and Applicant to focus on areas of disagreement (if any) with the goal towards allowance in the shortest possible time. If Applicant has any questions regarding the Examiner's positions or has other questions regarding this communication or even previous communications, Applicant is strongly encouraged to contact Examiner Andrew J. Fischer whose telephone number is (703) 305-0292. If attempts to reach the Examiner by telephone are unsuccessful, the Examiner's immediate supervisor, Robert Olszewski, can be reached at (703) 308-5183. To respond to this Office Action by facsimile, fax to (703) 872-9306.



Andrew J. Fischer
Patent Examiner
Art Unit 3627

AJF
July 12, 2004

¹³ *E.g.*, if the Examiner rejected a claim under §103 with two references, although not directly stated, it is the Examiner's implied position that the references are analogous art.